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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

SHAUN P. POSEY,

Defendant and Appellant.

B289590

(Los Angeles County  
Super. Ct. No. KA115817)

APPEAL from a judgment of the Superior Court of Los Angeles County. Bruce F. Marrs, Judge. Affirmed.

Jason Szydlik, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Zee Rodriguez, Theresa A. Patterson and William H. Shin, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Shaun P. Posey was convicted by jury of simple assault (Pen. Code, § 240 [count 1]) and assault with a deadly weapon (a hammer) (§ 245, subd. (a)(1) [count 2]). The jury found true the great bodily injury enhancement for count 2 (§ 12202.7, subd. (a)). On appeal, defendant contends his conviction of assault with a deadly weapon should be reduced to simple assault, reasoning there is insufficient evidence he used the hammer in a manner likely to cause death or great bodily injury. He also contends the great bodily injury enhancement should be stricken because there is no substantial evidence he broke the victim's jaw with the hammer. Defendant also contends the court erred when it denied his request for a continuance, and claims ineffective assistance of counsel for his attorney's failure to impeach the victim with his preliminary hearing testimony. We affirm.

### **BACKGROUND**

On June 1, 2017, at approximately 5:00 p.m., Richard Cota was driving in his 1969 Volkswagen in rush hour traffic on a Los Angeles freeway when he noticed defendant tailgating him. When Mr. Cota tapped his brakes, defendant became enraged, honking his horn, showing his middle finger, and throwing debris at Mr. Cota's car. As Mr. Cota drove along the freeway, defendant's erratic and hostile behavior continued. As both cars approached a freeway exit, defendant stopped suddenly, causing Mr. Cota to crash into him. The force of the collision crushed the front of Mr. Cota's car, and caused his right shoulder to dislocate. Defendant then sped away down the off-ramp, and Mr. Cota followed him to a gas station parking lot.

The gas station's video cameras captured what happened next. As Mr. Cota struggled to exit his severely damaged car,

defendant retrieved a hammer from his trunk, and rushed toward Mr. Cota. The video images of the initial contact between defendant and Mr. Cota were obstructed by a gas pump. Defendant pushed Mr. Cota backwards, with the hammer in his right hand. Defendant tackled Mr. Cota into some bushes in a planter, thrusting the hammer towards Mr. Cota's face, and then stomped, kicked, and kneed Mr. Cota as he lay prone in the bushes. Defendant's hands and Mr. Cota's face were obstructed from view of the video camera by the bushes during some of the attack.

According to Mr. Cota, he was trying to call 911 when defendant "charged at [him] in an aggressive manner waving the hammer." As Mr. Cota tried to back away, defendant grabbed him by the collar and pushed him back, and into the planter. Before Mr. Cota fell to the ground, the hammer struck his face. As he was pinned on the ground, he felt the hammer strike his face again. Defendant also struck him with his knee and fists. Mr. Cota yelled, "You broke my f---ing jaw!"

A customer testified he saw defendant strike Mr. Cota three times with a hammer on the upper right side of his body. He had a different view of the attack than the video. The video did not show the hammer strikes because the camera's view was obstructed.

Following the attack, Mr. Cota was in a great deal of pain. His jaw was dislocated, and he was unable to speak. His teeth were loose, and he had an abrasion on his nose. None of these injuries was caused by the collision; he did not hit his head when the cars collided.

He was taken to the hospital by ambulance. X-rays revealed that Mr. Cota suffered a mandibular fracture to his

lower right jawbone. The hospital's discharge paperwork included information about the causes and symptoms of mandibular fractures, and stated that the most common causes of mandibular fracture are car crashes, physical violence, or a fall from a high place.

Mr. Cota was certain that his jaw injury was caused by the attack and not the collision.

## **DISCUSSION**

### **1. Sufficiency of the Evidence**

Defendant contends insufficient evidence supports the assault with a deadly weapon conviction, because the video does not show him swinging the hammer and making contact with Mr. Cota's face, but only shows him holding the hammer during the assault. He argues the evidence does not establish the hammer was used as a deadly weapon. We disagree.

"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) "The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt." (*People v. Mincey* (1992) 2 Cal.4th 408, 432.) The reviewing court's "opinion that the evidence could reasonably be reconciled with a finding of innocence or a lesser degree of crime does not warrant a reversal of the judgment." (*People v. Hill* (1998) 17 Cal.4th 800, 849.) Reversal is only warranted when it clearly appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." (*Bolin*, at p. 331.)

“As used in [Penal Code] section 245, subdivision (a)(1), a ‘deadly weapon’ is ‘any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury. [Citation.] Some . . . objects, such as dirks and blackjacks, have been held to be deadly weapons as a matter of law; the ordinary use for which they are designed establishes their character as such. [Citations.] Other objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury. In determining whether an object not inherently deadly or dangerous is used as such, the trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue. [Citations.]” (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029). The question is whether the weapon was used in a way that was likely to cause significant or substantial injury. (*People v. Beasley* (2003) 105 Cal.App.4th 1078, 1087.)

Here, the evidence supports the jury’s conclusion that defendant used the hammer as a deadly weapon. Mr. Cota and a gas station customer testified that defendant struck Mr. Cota with the hammer. Mr. Cota testified the hammer hit his face, and that he suffered a broken jaw, loose teeth, and lacerations to his face. Contrary to defendant’s claims on appeal, this evidence was not contradicted by the video; many aspects of the attack were obscured by objects in the video. On this record, the jury could reasonably conclude the hammer was used as a deadly weapon. (Cf. *In re B.M.* (2018) 6 Cal.5th 528, 536 [no substantial evidence that butter knife was used as a deadly weapon where it was mildly pressed against victim’s blanketed legs, and not against any vulnerable or exposed part of the body such as head,

face or neck].)

Defendant next contends the great bodily injury enhancement is not supported by substantial evidence, reasoning the evidence did not establish that defendant broke Mr. Cota's jaw with the hammer. Penal Code section 12022.7, subdivision (a) provides that "[a]ny person who personally inflicts great bodily injury on any person . . . in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years." "[G]reat bodily injury' means a significant or substantial physical injury." (*Id.*, subd. (f).)

The same evidence discussed *ante* substantiates the enhancement. Whether the hammer or defendant's fists broke Mr. Cota's jaw, the jury could plainly conclude that defendant inflicted great bodily injury upon Mr. Cota during the commission of the assault.

## **2. Ineffective Assistance of Counsel**

Defendant contends his conviction must be reversed because his attorney failed to impeach Mr. Cota with his preliminary hearing testimony.

At the preliminary hearing, Mr. Cota was asked to describe his injuries. He testified that "[a]t that time I had cuts and abrasions to my face. I wasn't aware of any major injuries until I had been seen at the hospital. That's when I was notified of X-rays that I had a fracture in my jaw . . . ." At trial, Mr. Cota testified that he exclaimed that defendant broke his jaw during the attack.

To establish ineffective assistance of counsel, defendant must show both deficient performance and prejudice. (*People v. Hart* (1999) 20 Cal.4th 546, 623.) "To the extent the record on

appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment “unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation . . . .” ’ ” (*Id.* at pp. 623-624.)

One explanation seems obvious to us. It was likely more damaging to impeach Mr. Cota than to allow his testimony to stand. Mr. Cota testified he talked normally before defendant pushed him into the planter, whereas after the attack, he could not speak, his jaw was dislocated, and he had loose teeth. If counsel had tried to impeach him, it is likely there would have been even more testimony by Mr. Cota repeating and elaborating on how his jaw was injured in the attack.

Moreover, we can discern no possible prejudice on this record. The evidence overwhelmingly established that Mr. Cota’s jaw was broken during defendant’s attack.

### **3. Continuance**

The case was set for trial on March 7, 2018. At a March 5, 2018 readiness hearing, the People announced ready for trial. Defendant sought a continuance, arguing he had only recently subpoenaed Mr. Cota’s medical records, and had received them within the last two weeks. Counsel argued it was an “oversight” that the records were not subpoenaed sooner, and that defendant would like to hire a medical expert to evaluate the records, and needed to file a request with the court for funds to do so. Defendant’s written motion simply argued that “[d]ue to recently received Discovery of alleged victim’s medical records defense counsel requires more time to evaluate said records, discuss them with Defendant Posey and determine whether a forensic medical expert should be retained or appointed to testify at trial.”

The trial court denied the request for a continuance, finding that counsel had been dilatory. During sentencing, defendant represented, for the first time, he had sought the continuance to seek funds to hire an expert “to evaluate medical records . . . that said the fracture might have been caused by impact with the steering wheel as opposed to being struck with a hammer.”

A continuance pursuant to Penal Code section 1050 may only be granted for good cause. (*People v. Doolin* (2009) 45 Cal.4th 390, 450.) “Whether good cause exists is a question for the trial court’s discretion. [Citation.]” (*Ibid.*) A court abuses its discretion in denying a continuance “only when the court exceeds the bounds of reason, all circumstances being considered.” (*People v. Beames* (2007) 40 Cal.4th 907, 920.)

We find no abuse of discretion here. Defendant never told the court before trial why he needed a medical expert or what material evidence an expert might offer. It was not until sentencing that counsel said an expert might opine the jaw injury was caused by the collision and not the gas station attack. That was never suggested during the hearing on the motion to continue, by which time the case was old and the trial date was imminent. Defendant has not shown prejudice.

#### **DISPOSITION**

The judgment is affirmed.

GRIMES, Acting P. J.

WE CONCUR:

STRATTON, J,

WILEY, J.